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Irresponsible Persons: The Imposition and Execution of Mandatory Treatment Measures in the Criminal Procedure of Kosovo

Mujë Ukaj

Haxhi Zeka, Pejë-Kosovo

Abstract

According to the Code of Criminal Procedures of Kosovo, the treatment of irresponsible persons is carried out in a special criminal procedure only with regard to the determination of innocence, respectively irresponsibility and the imposition of compulsory psychiatric treatment, while further treatment is transferred to the competent court for the abolition of legality action and then begins with the execution of the measure imposed within the psychiatric institution.

In comparative criminal law, security measures are mainly part of the criminal sanction system, but there are also exceptions. The treatment of irresponsible persons in Kosovo's criminal legislation was built based on the criminal models of Western and US states by applying sui generis medical measures instead of classical sanctions. As for the difference between sentences and security measures, in the theory of contemporary criminal law, there are different opinions.

This paper first describes the mandatory treatment measures under the Criminal Code of Kosovo, along with the special procedure conducted in the criminal court for imposing mandatory treatment measures for persons with mental disorders. The suite explains how these measures are executed. Finally, this paper draws valuable conclusions and recommendations on criminal science.

Key words: *irresponsibility, mental disorder, special procedure, psychiatric treatment, probation service.*

1. Introduction

The phenomenon of criminality by persons with mental disorders is also present in Kosovo. This phenomenon deserves the multidisciplinary approach of this study, both of the factors that determine it, as well as of the measures of treatment

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of such persons during the ante delictum and post delictum periods. The purpose of undertaking preventive measures is to prevent criminal activity of persons with mental disorders. Kosovo has not yet completed reforms of its legal infrastructure for mental health nor updated its penitentiary institutions. Until such reforms are complete we will face poor functioning of the system of enforcing mandatory treatment measures: compulsory psychiatric treatment and custody in a health institution, and compulsory psychiatric treatment at liberty. Given the current state of the problem and the difficulties of executing these measures, it is reasonable to attempt to address this problem.

Criminology distinguishes between criminal offenses committed by normal persons and criminal offenses committed by persons with mental disabilities. People with mental disorders have their own special world that is in contrast to the real world and when these two worlds collide, criminal activity can result. However, this does not always happen and therefore does not mean that the person's ill health is necessarily a factor of criminal behavior. Persons with mental disorders when appearing as perpetrators of criminal offenses are not subject to criminal liability (they are considered as irresponsible persons) or are subject to reduced liability and certain preventive measures are imposed, measures of mandatory treatment which are pronounced by the court in criminal proceedings.

Contemporary medical and criminal law practice are still developing different and controversial opinions with regard to perpetrators of criminal offenses who have mental disorders. Thus, in criminal legal science, antagonisms have attained such a degree that as a result, two types of treatment have emerged: a criminal model and a medical model (Ukaj. M., 2015, p. 338).

Proponents of the criminal model think that the treatment of perpetrators with mental disorders should remain within criminal law, since only within it can criminal law prevent and combat criminality in general and psychopathological criminality in particular (Ibid.).

On the other hand, supporters of the medical model think that the treatment of persons with mental disorders must pass from criminal law to medical law because the medical right gives them more rights and security, both in terms of healing, as well as in terms of humane treatment, always in line with contemporary standards for the respect and protection of basic human rights (Ibid.).

The following discusses measures of treatment for irresponsible persons according to the Kosovo Criminal Code of 2012.

2. Measures of treatment for irresponsible persons

There are three categories of people with mental disorders who deal with material criminal law and the right to criminal proceedings. The first category deals with irresponsible persons, the second category concerns persons with substantially reduced capabilities and the third category concerns *actiones liberae in causa* (Kosovo Criminal Code, 2013, art. 87, 88). For these three categories, the law provides for the imposition of medical measures and penalties. Mandatory

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treatment measures under the Kosovo Criminal Code of 2013, Articles 87 and 88, are:

- a) compulsory psychiatric treatment,
- b) compulsory treatment for persons with mental disabilities, and
- c) compulsory treatment for alcohol and drug addicts

On one hand, the treatment of irresponsible perpetrators in Kosovo's criminal legislation was built on the models of the Criminal Codes of Western Europe countries and US, applying *sui generis* medical measures. On the other hand, in criminal codes of some other European countries, (Macedonian Criminal Code - 2004, Serbian Criminal Code - 2005, Montenegro Criminal Code – 2003, etc.), these measures are called security measures or rehabilitation measures. In the territories of the former Yugoslavia, such as Slovenia, Croatia, Bosnia and Herzegovina, and Macedonia such measures are called security measures (Salihi, I., 2012, p. 518-519). Measures to deal with irresponsible perpetrators have some important functions. First they protect society from danger, because irresponsible perpetrators, rather than being sent to jail, are sent to psychiatric institutions for the purpose of recovery. This also serves for the prevention of criminality, to a large extent via the psychiatry service which performs treatment on the one hand, and on the other makes efforts to avoid the dangerous conditions of the perpetrator with mental disorders.

According to Kosovo's criminal legislation, mandatory treatment measures are imposed on irresponsible perpetrators and are considered as medical measures that serve to cure the perpetrator and avoid the risk of any criminal offense or recidivism. However, for the Court, prior to imposing mandatory psychiatric treatment measures in a health institution, four conditions must be met beforehand:

- that the criminal offense has been ascertained in criminal proceedings;
- that the offense was committed by an irresponsible perpetrator;
- that the court finds releasing the perpetrator to be risky, and
- in order to avoid risk, the perpetrator must be sent to a health institution. (Salihi, I., 2012, p. 519-520).

Articles 87 and 88 of the Criminal Code of Kosovo state that the actions of determining the measure of compulsory psychiatric treatment of a perpetrator who is mentally irresponsible or who has reduced mental capacity shall be determined in a special way by law (Criminal Code of Kosovo, 2012). Therefore, mandatory treatment measures, according to criminal law and the criminal law of Kosovo, are governed by special regulations. For instance, compulsory medication measures are imposed for the treatment of drug or alcohol addicts.

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Medical measures are of an overriding character, they are imposed by the court without a fixed term and unlike punishment, medical measures have no other legal consequences. (Elezi, I., Kaçupi, S. and Haxhia, M.R., 2005, p. 54). In fact, medical measures under the Albanian Penal Code have a preventative, rather than a retributive character and are considered to be special penal sanctions (Ukaj, B., 2006, pp. 282).

Compulsory treatment measures are outside the criminal sanction system. Against irresponsible persons, no punishment can be imposed, nor any other type of criminalization, but psychiatric treatment measures can be imposed, which have two functions: the first to diminish the risk that such persons will commit the offense again, while the second, by applying a measure of medication, aims to humanize criminal law. Criminal sanctions can only be imposed on somewhat accountable perpetrators, along with compulsory psychiatric treatment measures. Measures of compulsory treatment in Kosovo's criminal law are not criminal sanctions but are treated as special measures or *sui generis* of a medical character, reserved for irresponsible perpetrators and those addicted to drugs and alcohol.

Under the Criminal Code of Kosovo, the treatment of irresponsible persons is carried out in a special criminal case only with regard to the determination of innocence, respectively irresponsibility and the imposition of compulsory psychiatric treatment, following which the case is immediately transferred to the competent court for removal of the police force, and then execution of the measure imposed is begun in a psychiatric institution (Kosovo Criminal Code, 2012).

2.1. The measure of compulsory psychiatric treatment at a health institution

Mandatory treatment of irresponsible perpetrators in institutions for psychiatric healing, as mentioned earlier, is primarily aimed at curing perpetrators and avoiding the risk they pose to society and themselves.

This measure is imposed by the court in a special criminal procedure and is executed in special psychiatric institutions. The report and opinion determined by the psychiatrist expert on the perpetrator's risk for the court provides a sufficient base for imposing mandatory psychiatric treatment in an institution, regardless of the degree of danger, because this is not properly defined in the Criminal Code. The risk assessment of the irresponsible perpetrator consists of the risk of repeating the offense.

The Court will impose compulsory psychiatric treatment if it finds that the perpetrator has committed a criminal offense punishable by at least three years in a state of mental disability or impaired mental capacity, and there is a serious risk that the perpetrator will commit a criminal offense involving a violent act or causing bodily injury to another person, and mandatory psychiatric treatment with custody is necessary to avoid such danger (Salihu, I., 2012, p. 521).

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The Criminal Code has provisions referring to the procedure of imposing mandatory treatment measures, according to which the proposal is submitted by the state prosecutor following the opinion received from psychiatric expertise. This measure, according to the Kosovo Criminal Code, is pronounced after the trial has been held by the court in a special procedure.

The measure of compulsory psychiatric treatment with detention is executed in the health care institution located in the permanent residence or in the defendant's place of residence but if such an institution is not available, than in a nearby institution or in the place where criminal proceedings have been enforced. The Criminal Code of Kosovo also foresees the obligation to monitor the execution of the measure of compulsory psychiatric treatment by the court and the competent body for health.

It is worth pointing out that the Criminal Code of Kosovo does not define decisively what is a public institution responsible for health, because such a special institution in Kosovo still does not exist. Therefore, lawmakers have left the possibility open, alluding to the fact that an institution for dealing with irresponsible perpetrators in Kosovo will be established in the near future, which has not happened until today.

Pursuant to the Criminal Code of Kosovo, the health care institution is obliged to report to the court once every six months on the state of health and the achievements made in the health of the person on whom the measure was imposed. On the other hand, the court that issued the first instance decision after the report of the medical institution is obliged to consider the possibilities of continuing the measure of compulsory treatment or its termination.

The following section discusses the measure of compulsory psychiatric treatment at liberty for irresponsible persons.

2.2. The measure of compulsory psychiatric treatment at liberty

The measure of compulsory psychiatric treatment at liberty is considered to be a milder measure that can be imposed on irresponsible perpetrators, compared to compulsory psychiatric treatment in an institution. The reasons why this measure is considered milder is that, according to an expert's assessment (Kosovo Procedural Code, 2012, Art, 508), treatment can be done in ambulatory conditions, and at the same time, given the level of mental disorder, the perpetrator is not considered dangerous for the society and for himself.

The treatment time is not limited and entails continuous correspondence of the psychiatric institution with the court, so the perpetrator is in under permanent observation of the doctor and the court. (Ibid.).

The Criminal Code provides the rationale for the imposition of compulsory psychiatric treatment at liberty. Provisions provide that the court imposes the measure of compulsory psychiatric treatment in freedom to a perpetrator who has committed a criminal offense in a state of mental disability or mental impairment, if:

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- there is a serious risk that the perpetrator will commit an offense involving a violent act or causing bodily injury to another person; and
- compulsory psychiatric treatment is necessary to avoid this risk.

Regarding the imposition of mandatory psychiatric treatment in freedom, the same provisions apply as to the imposition of compulsory psychiatric treatment in an institution. The execution of mandatory psychiatric treatment in freedom is carried out at a health care institution, where it is determined that the irresponsible persons will appear for a treatment, which is a timeline measure, imposed by the Court. This measure will last as long as necessary and for this reason, the court and the health care institution are in continuous correspondence.

The duration of compulsory psychiatric treatment in freedom depends on the success achieved with the treatment of the person on whom this measure is imposed.

In judicial practice in Kosovo (conversation with judges), is discovered that there are major problems regarding the execution of psychiatric measures for irresponsible perpetrators. The reason lies in the fact that Kosovo does not yet have specialized institutions for this purpose.

2.3. The measure of treatment on alcoholics and drug addicts

The category of compulsory psychiatric treatment of drug and alcohol-related perpetrators is separate from compulsory treatment of perpetrators with mental disorders, because these people are considered to suffer from socio-pathological problems. Measures against them can be executed in an institution or at liberty, depending on the danger they pose for society and themselves, and the risk of repetition of the offense.

The Criminal Code of Kosovo has provided for treatment of alcoholics and those addicted to narcotics. Thus, according to Article 91, paragraph 1, of the above mentioned Code; the court may impose compulsory rehabilitation in a health institution on any person who has committed a criminal offense under the influence of drugs or alcohol, if the court has pronounced the punishment, the court's notice or the perpetrator has been released from the punishment, and the court finds that the perpetrator was motivated to commit the offense by alcohol or drug addiction, and the likelihood of the perpetrator's successful treatment. The time spent in the health institution is calculated on the amount of the punishment.

In addition to the mulct sentence, judicial remark or the release from punishment, the court may decide, with the consent of the convicted, that such a treatment can be executed at liberty. If the perpetrator, without a reasonable cause, is not subject to the treatment at liberty or arbitrarily abandons treatment, the court may order that the treatment be executed at a health facility. While the measure is pronounced in addition to a prison sentence, it may last until the sentence is served, but if the measure is imposed in addition to a fine, a judicial

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remedy or a punishment, the treatment can not last more than two years, giving the opportunity for the judge to review the execution of this measure every two months in order to assess its possible extension.

3. Imposing Mandatory Treatment Measures

Pursuant to Article 512 of the Code of Criminal Procedure of Kosovo, the state prosecutor proposes to impose the measure of compulsory psychiatric treatment, before the opening of the main trial. It foresees that the court impose the measure of compulsory psychiatric treatment if the defendant has committed a criminal offense in a state of mental disability and if there are reasons for such a measure, as provided for in the Criminal Code - Articles 88 and 89.

If the evidence presented at the main trial demonstrates that the defendant has committed a criminal offense in a state of mental disability, the state prosecutor changes the indictment during the main trial and submits a proposal for the court to impose a measure of compulsory psychiatric treatment if there are reasons for the pronouncement of such measure. The measure of compulsory psychiatric treatment is pronounced after the court hearing by the court which is competent to adjudicate the case at first instance under Article 513 of the Code of Criminal Procedure. In addition to the persons who should be summoned to the main trial, experts and psychiatrists from the health care institution who are entrusted with conducting the psychiatric examination of the accused's mental capacity should be summoned. The defendant's spouse and his parents or adoptive parents are notified of the judicial review. Upon completion of the procedure for the imposition of mandatory psychiatric treatment, its execution is regulated by the Law on Execution of Criminal Sanctions in Kosovo 2013.

The court is obliged to verify the perpetrator's mental condition at any time during the proceedings, including the time during the main trial, if there is a suspicion that the defendant is in a state of mental disability or was in a state of impaired mental capacity at the time of committing an offense.

The court *ex officio* or on the motion of the state prosecutor or defense counsel may appoint an expert to conduct the psychiatric examination of the defendant to ascertain whether:

- at the time the offense was committed the defendant was in a state of mental disability or mental impairment, or
- the defendant is incapable of facing judgment;

According to Article 508 of the Code of Criminal Procedure, the purpose of psychiatric expertise is to determine the degree of accountability of persons under criminal liability when there are data suggesting psychological illness. The expert should evaluate the psychic condition of the perpetrators at the time of committing criminal offenses (a moment directly related to accountability from the criminal justice point of view) and at the time of the evaluation, as well as the

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state of those mentally ill during detention. The importance of the opinion of the psychiatric expert also lies in the fact that on its basis the court determines the type of medical measures for persons who are considered irresponsible for the offenses they have committed and for those who become ill after the commission of the crimes or during detention or imprisonment. The psychiatric expert has a duty to evaluate the psychic ability, i.e. the psychological condition of the perpetrator of the criminal offense in relation to the act committed.

The expert also has a duty to determine the nature, type and degree of illness or psychological disorder, to determine how much this psychic condition of the perpetrator has caused the irresponsibility or reduction of the criminal responsibility of the perpetrator at the time of the commission of the offense, and to assess the degree of risk that this person presents to society (Kosovo Procedural Code, 2012, Art. 508).

The reason for imposing compulsory psychiatric treatment with detention lies in the fact that such persons pose a risk to the district where they live and to themselves because their psychic condition prevents them from understanding the importance of actions and of controlling their own actions. The humanization of criminal law in terms of the treatment of a perpetrator is also reflected in the determination of compulsory psychiatric treatment measures as special measures that may be imposed on a particular category of perpetrators.

Undoubtedly, Article 87 paragraph 1 of the Criminal Code of Kosovo is of special importance because it clearly stipulates that perpetrators with mental disorders must be treated with humanity respecting their dignity as human beings in accordance with applicable international standards, being limited depending on need and circumstances. Thus, Article 87 para. 2 of the Code, stipulates that for perpetrators with mental disorders, international standards must apply to the highest possible degree.

4. Execution of compulsory treatment measures

The contemporary status of irresponsible perpetrator was inaugurated after the French Revolution in 1879 as a result of the development of psychiatry science, with the subsequent introduction of this legal institution into the French Criminal Code of 1810, where Article 64 of the Code states, "There is no crime or delinquency when the defendant has been in a state of madness at the time of committing" (Grozđanić, V., 1988, p. 50.). This wording was later accepted by the Criminal Code of Turkey, Belgium, Monaco, Luxembourg, etc. (Ibid.).

The origin of the advancement of the position and treatment of delinquents with mental disorders, respectively irresponsible perpetrators, dates from the last decade of the last century (Ibid.). This new development in the field of criminal law has been influenced by the development of psychiatric science and a rising level of respect for international human rights conventions. Today, modern states have made quality and very important reforms as a result of the integration and

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standardization of criminal legislation. In this context, it is worth pointing out a very important issue in the development of legal psychiatry of late: the change away from the concept of criminal responsibility, shifting towards the concept of dangerousness of the irresponsible perpetrator (Ibid.). Therefore, the assessment of the perpetrator's peril of the criminal offense in the future presents the greatest challenge for legal psychiatric experts. Significant steps in this direction have been marked by member states of the European Union, as well as other European countries in transition, which aim to integrate (Ibid.).

From the earliest times, it was practiced that delinquents with mental disorders as perpetrators were sent to psychiatric hospitals. During the 18th century, irresponsible perpetrators were placed in special asylums, and in the 19th century compulsory commitment to psychiatric hospitals for indefinite periods began to be enforced, as a result of which there is a large spread of psychiatric hospitals providing services throughout Europe. The first act regulating the issue of irresponsible perpetrators in the United Kingdom was released in the early 19th century following a case when a person with a mental disorder attempted to kill King George III (Salize, H.J. and Dreßig, H., 2005, p. 9-11).

Thus, in 1815 a specialized detachment facility was opened, which over time was over-crowded, which has resulted in a great debate today among psychiatric experts. These special wards providing minimal treatment by specialized teams that also performed the surveillance role, were walled and had no communication with the outside world. Treatment programs in psychiatric institutions for irresponsible perpetrators have undergone continuous reforms, especially in the 1980s, which have led to the reintegration of some such persons into society, and in addition provide greater public security, avoiding the risk of repetition of criminal actions (Ibid.).

However due to the complexity of some mental illnesses, a person suffering from such an illness always poses a potential risk to society, and taking into account this fact, such persons are sent to health care institutions in order to avoid criminal behavior (Bačić, F. 1995, p. 417-418).

Some authors in the area of legal psychiatry consider that the professional treatment of irresponsible mental perpetrators is still in the initial phase, so there is a permanent need for ongoing research in this area. Psychiatric experts who deal with the issue of irresponsible perpetrators when it comes to expertise that should be offered to criminal and civil courts should be prepared and specialized in: assessment of irresponsible perpetrators, preparation of court reports to provide the testimony of expertise in the court, treatment of chronic mental disorders, and recognition of the law on mental health (Salize, H.J. and Dreßig, H., 2005, p. 9-11).

Significant achievements in the development of psychiatric science and the advancement of the legal position and treatment of irresponsible perpetrators have been done in Kosovo as well. Today, thanks to scientific achievements in the field of psychiatric science, irresponsible perpetrators in Kosovo are subjected to

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necessary humane medical treatment respecting international standards for the protection of basic human rights.

The enforcement of mandatory psychiatric treatment measures for irresponsible perpetrators is regulated by the Law on Execution of Criminal Sanctions in Kosovo - Articles 181 to 185. Mandatory psychiatric treatment measures with detention shall be enforced in a health care institution in the residence of the defendant, or if such institution is not located in that place, in the institution closest to the place where the defendant has a permanent place of residence, which always takes into account the risk that the defendant poses to the environment. Whenever the court imposes this measure, it immediately sends the decision to the competent Probation Service and to the health care institution, correctional facility or the appropriate institution for the execution of this measure. If such a measure is imposed together with a sentence of imprisonment, the perpetrator shall first be sent to a health care institution for treatment.

If the person is at liberty, the court orders his transfer to the health care institution but if the person is in detention, the Kosovo Correctional Service staff passes him to the health care institution. The health care institution sends to the court a report on the state of health and the success of treatment of the person on whom the measure is being executed, at least once every six months and more often at the request of the court. When the health care institution responsible for mental health treatment finds that it is no longer necessary to treat the perpetrator of the offense at the healthcare institution, they immediately inform the court.

According to the official schedule or on the request of the defendant, the defense counsel of the health care institution informs the court which has imposed the measure if it finds that it is no longer necessary for the perpetrator to be treated or detained in that institution. When the measure ceases, the court may impose a measure of compulsory treatment at liberty. Once the person is released from the health care institution, the competent custody body is responsible for the person on whom the measure was taken to provide relief after release from the healthcare institution. The measure of compulsory psychiatric treatment in freedom is executed at the healthcare institution decided by the court that has imposed the measure in the first instance. The person on whom the measure is imposed is obliged to appear at the healthcare institution for treatment within the time determined by the court. When the health care institution determines that it is no longer necessary to treat the perpetrator, they immediately inform the court that has imposed the measure in the first instance. The court, ex officio or at the request of the defendant, the defense counsel, the health care institution or the competent guardianship authority, suspends the measure if it finds that it is no longer necessary to treat the perpetrator of the criminal offense (Halili, R., 2014, p. 241-243).

5. Conclusion

When people with mental disorders are offenders in Kosovo, they are treated with humanity respecting their minimal human rights though the proper institutions for treatment, post delictum, are not yet fully functional and established as they have a high budget cost. Special legal procedures are in place for perpetrators with mental disorders in Kosovo.

According to Kosovo's Criminal Procedural Code of 2012, when a perpetrator with a mental disorder commits a criminal offense, the police raises a criminal charge, followed by arrest and detention. In the case of suspicion that the perpetrator has committed a criminal offense in a state of mental disorder, the court ex officio or on the proposal of the state prosecutor or the defense counsel assigns psychiatric expertise. Once the evidence is examined, the court can declare the perpetrator irresponsible and pronounce one of the mandatory psychiatric treatment measures in a psychiatric institution or in freedom.

Upon making a final decision, the court follows the procedure of abolishing the ability to act and then begins execution of the mandatory psychiatric treatment measure. The same can be continued, depending on the success of the treatment and the risk of repeating the offense.

Execution of compulsory treatment measures in Kosovo is executed in mental health institutions, respectively at the Psychiatric Forensic Institute with headquarters in Pristina. However, the current state of treatment of persons with mental disorders in psychiatric hospitals is not satisfactory, as it is often the case that psychiatric hospitals where perpetrators with mental disorders are sent, in many cases also house other mentally ill persons who have no criminal offenses. Given this situation, perpetrators of mental disorders often collide with other mentally ill persons and cause conflicts.

On the other hand, they sometimes refuse the rules of hospitals and as a result voluntarily leave the hospitals and go back to the streets. At present, there is a situation that health institutions are unable to retain persons in compulsory treatment and they can not be found either in the hospital or in the prison, but on the street, and in this case pose a risk to society and their health.

Kosovo still needs to further improve the state of treatment of perpetrators with mental disorders, both in the legislative and professional settings. It is worth noting that there is still no unique legislation that regulates this issue.

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